

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 178
3051632

BETWEEN KATHLEEN ANN BEATTIE
 MILNE
 Applicant

AND AIR NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 David France, counsel for the respondent

Investigation Meeting: On the papers

Submission: 22 February 2019

Determination: 27 March 2019

DETERMINATION OF THE AUTHORITY

A. The application by Kathleen Milne for a further investigation of alleged problems in her former employment relationship with Air New Zealand Limited is declined.

B. Costs are reserved.

Ms Milne's application

[1] In an application received by the Authority on 16 January 2019 Kathleen Milne sought an Authority investigation of an employment relationship problem with Air New Zealand that she described as “the separation from family and my home country and financial hardship due to the terms and conditions of employment from 1972 to 2006.”

[2] A British citizen, born in Aberdeen, Ms Milne was resident in Brisbane, Australia in 1971 when she applied for a role as a flight hostess (as the position was then called) with Air New Zealand. At the time she was working for TAA, an Australian airline that later became part of Qantas. In 1972 she was offered a job with Air New Zealand that required her to move to Auckland to attend Training School. An “initial engagement form” recorded that her appointment began on 22 October 1972 as a “flight hostess under training”.

[3] Ms Milne’s career with Air New Zealand continued until November 2004 when she was dismissed on the grounds of medical incapacity. She had been medically certified as permanently unfit to fly and Air New Zealand was not able to find any suitable and available alternative position she was qualified to perform.

[4] Authority determinations and Employment Court decisions on the subsequent litigation about the end of Ms Milne’s employment relationship with Air New Zealand, and the circumstances that led to it, have included:

- A determination issued on 3 February 2011 finding Air New Zealand’s decision to dismiss Ms Milne was justified;¹
- A determination issued on 13 July 2012 finding she could not pursue a further claim about her terms and conditions while employed by Air New Zealand;²
- A decision of the Court issued on 9 July 2014 striking out two challenges by Ms Milne to the Authority’s determinations of 2011 and 2012;³
- A determination issued on 31 March 2016 declining to investigate a claim for damages that Ms Milne sought due to being unemployed since her dismissal;⁴
- A determination issued on 20 October 2016 declining to reopen the investigation carried out by the Authority in 2010 that had resulted in the 2011 determination;⁵ and

¹ *Milne v Air New Zealand Limited* [2011] NZERA Auckland 45.

² *Milne v Air New Zealand Limited* [2012] NZERA Auckland 236.

³ *Milne v Air New Zealand Limited* [2014] NZEmpC 101.

⁴ *Milne v Air New Zealand Limited* [2016] NZERA Auckland 98.

⁵ *Milne v Air New Zealand Limited* [2016] NZERA Auckland 353.

- A determination issued on 19 February 2018 declining an application for a further investigation of aspects of her circumstances and Air New Zealand's actions in 2004.⁶

[5] The Court's decision in 2014 recorded that Ms Milne had not paid costs orders made by the Court and the Authority for:⁷

- \$10,000 security for costs on the first challenge; and
- \$1,250 costs in relation to that security for costs application; and
- \$1,500 security for costs on the second challenge; and
- \$500 costs in relation to that security for costs application; and
- \$8,000 costs in the Authority.

[6] The Authority's determination on Ms Milne's second application in 2016 concluded she was trying to re-argue her case but had not established any interest of justice that outweighed what Air New Zealand could reasonably rely on as the finality of the proceedings struck out by the Court in 2014.

[7] The Authority's determination in 2018 dismissed Ms Milne's application without further investigation on three grounds:

- (i) She had no new or different evidence that has not been considered, or was not available, at the time of the earlier investigations and determinations in 2011 and 2012.
- (ii) It had no prospect of success.
- (iii) It met the legal test of matters that may be dismissed if considered by the Authority to be frivolous and vexatious.⁸

[8] The 2018 determination included the following explanations of the situation and Ms Milne's continued lodging of applications (twice in 2016 and once in 2018):⁹

Ms Milne's disappointment and disagreement with how her employment of more than 30 years with Air New Zealand came to an end more than 13 years ago clearly remains of personal importance and seriousness to her. However her attempts to continue litigation about those circumstances have reached a

⁶ *Milne v Air New Zealand Limited* [2018] NZERA Auckland 52.

⁷ *Milne*, above n 3, at [11].

⁸ Employment Relations Act 2000, Schedule 2 clause 12A.

⁹ *Milne*, above n 6, at [17] and [19].

stage where they trifle with the Authority's process because the substance of her claims have already been determined in 2011 and 2012 and the Court has struck out the challenges to those determinations in 2014. In that context Ms Milne's current application is frivolous. This is apparent when it is considered in the further context of her two unsuccessful applications in 2016 (for damages and for a reopening of the 2011 investigation). All three applications have sought to re-argue matters already decided on the same evidence. They all have had to fail for, essentially, all the same reasons given in the Authority's two determinations in 2016.

...

Ms Milne's application was not improper in the sense of being pursued for an ulterior purpose but, given the application of the *res judicata* principle, had no reasonable basis and was one of what has become three attempts to persist with such proceedings trying to re-litigate issues already determined. Ms Milne has already had and exercised her constitutional right of access to the employment institutions. Given those outcomes her attempt to pursue proceedings in which she cannot succeed must be balanced with the desirability of freeing Air New Zealand from litigation for which Ms Milne has established no grounds to continue. In that light her present application was not only frivolous but also vexatious.

[9] Those conclusions were identified in the 2018 determination as being underpinned by the following observation made by the Employment Court in its 2014 decision dismissing Ms Milne's challenges to the 2011 and 2012 determinations:¹⁰

I consider it relevant, having regard to the overall interests of justice, that Ms Milne's claims have been heard and determined already by the Authority. She has a strong view that the claims have merit and that they ought to be heard but this is not a case where the plaintiff's claims have yet to be decided by an independent body. It is apparent, from a perusal of the Authority's two determinations, that Ms Milne's complaints have been fully considered and rejected. I accept Mr France's submission that this is not a case involving an attempt to have the plaintiff's claims dismissed in the absence of any hearing whatsoever.

[34] Standing back and considering the overall interests of justice, I am satisfied that both proceedings ought to be struck out. It is time for these proceedings to be brought to an end. I accept that the defendant will face significant prejudice if the proceedings are allowed to dawdle on. ...

The Authority's investigation

[10] Against that background the procedure followed to consider Ms Milne's latest application was the same used in 2018. The preliminary issue of whether the Authority could or should investigate her 2019 application was determined on the papers. Air New Zealand was not required to lodge a statement in reply. Ms Milne,

¹⁰ [2014] NZEmp C 101 at [33].

who is now resident in southern Queensland, was given an opportunity to make written submissions on the following matters for resolution:

- (i) Did her present application rely on any new or different evidence that was not considered, or was not available, at the time of earlier investigation and determinations of her previous applications to the Authority (including in 2011 and 2012)?
- (ii) If the subject of Ms Milne's present application was a personal grievance not determined in previous determinations:
 - (a) Was a personal grievance on that subject raised within, at the latest, 90 days of the end of her employment;¹¹ and
 - (b) If so, why would the three-year statutory limitation on pursuing such a grievance not apply?¹²
- (iii) If the subject of Ms Milne's present application was about an employment relationship problem that was not a personal grievance, why would the six-year statutory limitation on such a cause of action not apply?¹³
- (iv) Was there anything to indicate that her present application would have any real prospect of success?
- (v) Why, in light of earlier determinations or decisions of the Authority or the Court in respect of costs or security for costs, should she be permitted to proceed with her present application?
- (vi) Subject to anything she may say in respect of questions (i) - (v), was there any reason the Authority should not exercise its discretion to dismiss her present application as frivolous or vexatious?

[11] Ms Milne used that opportunity to lodge a three-page submission addressing those questions. No submission in reply was needed from Air New Zealand.

Any new evidence not considered or not available in earlier investigations?

[12] Ms Milne submitted there was new or different evidence that was not considered or not available at the time of earlier investigations and determinations, including in 2011 and 2012.

¹¹ Employment Relations Act 2000, s 114(1).

¹² Employment Relations Act 2000, s 114(6).

¹³ Employment Relations Act 2000, s 142.

[13] Ms Milne provided copies of documents dated 1971 and 1972 about the arrangements for her employment with Air New Zealand. Some correspondence from Air New Zealand in those years had been sent to her care of addresses for her father, then resident in the Queensland town of Mount Isa, and her brother in Sydney. She also provided what appeared to be a copy of a medical record that included notes on a knee injury in 1973, neck pain in 1974 and hearing issues in 1979. It was not clear how any of this related to an employment relationship problem but her application ended with a statement that “during 1973 and 1974 I attended the Air New Zealand doctor and reported illness and injury”.

[14] There was nothing in her application that explained how her references to “separation from family and ... home country” and “financial hardship” during the years of her employment with Air New Zealand amounted to unjustified actions by the company, that could be the basis of a personal grievance, or a breach of her terms of employment.

[15] The Authority’s investigation in 2010, resulting in its first determination in 2011, canvassed what was described as the complex medical history underlying the termination of Ms Milne’s employment in 2004. Even if the documents provided with her latest application, comprising correspondence in 1971 and 1972 and the medical records with notes for the period from 1973 to 1979, were not considered in that investigation, there was no information to suggest they were not records that were available to the parties in 2010 and 2011. Even if they were not, there was nothing to suggest they would have made any difference to the outcome, either to her eventual dismissal for medical incapacity in 2004 or the Authority investigation in 2010.

A personal grievance raised or pursued?

[16] Even if Ms Milne’s concerns about separation from her family and financial hardship could have amounted to a personal grievance, there was nothing to indicate those problems were raised as personal grievances during the employment relationship or within 90 days of the employment ending. And, even if such grievances had been raised within the statutorily-required 90 days, there was also nothing to indicate such grievances were then pursued within the three-year period during which action on a grievance (once raised) must be taken. On either analysis, such claims were beyond the limitation periods in which proceedings could continue.

The statutory limitation on other applications

[17] If the issues of separation from family and concerns about financial hardship were not grievances but amounted to some other breach in the terms of Air New Zealand's employment agreement with her, Ms Milne was well outside the six-year limitation period for commencing action on such breaches.

[18] In 2012 Ms Milne had also sought to pursue some claims about contractual issues. The Authority's determination on that application found her claim was misconceived but, even if there had been some arguable grounds, her employment had ended more than seven years earlier. At that time she was already outside the six-year statutory limitation.

No real prospect of success

[19] Even if Ms Milne's applications had cleared the jurisdictional issues on raising and pursuing claims within the relevant statutory periods, there was nothing about her most recent application that indicated it had any real prospect for success. She had successfully applied for a job with Air New Zealand that required a move to New Zealand and she was engaged under agreed terms and conditions of employment. There was nothing to indicate Air New Zealand had acted unlawfully towards her on either account.

Costs and security for costs

[20] Ms Milne is already subject to orders for costs and security for costs relating to her earlier applications. There is nothing to indicate she had ever paid those amounts. There is no apparent reason Air New Zealand should have to incur further legal expense in defending further claims with no real prospect of success.

Dismissal of frivolous and vexatious claim

[21] Given the history of this matter, and particularly the Court's decision to strike out challenges filed by Ms Milne, the Authority's 2011 determination stands as a final decision about the justifiability of what Air New Zealand did and decided in the events that led to its decision to end the employment relationship. The principle of finality applies to end litigation over the same point again and again. Applications in 2016 and 2018 failed for the same reasons. The analysis of the frivolous and

vexatious nature of Ms Milne's 2018 application applied in equal measure to this latest application.

[22] Accordingly, for the reasons given, Ms Milne's application is dismissed without further investigation for being frivolous and vexatious.

Costs

[23] While Air New Zealand was not put to the expense of any legal assistance required to provide a statement in reply or to respond to Ms Milne's submissions, it may have incurred some costs in being provided with advice about the present application. If so, and it wishes to have a costs award considered, leave is reserved for Air New Zealand to lodge a costs memorandum. If it does so, Ms Milne would then be given an opportunity to respond before any order on costs was made.

Robin Arthur
Member of the Employment Relations Authority